Public Prosecutor v Ong Poh Cheng

HIGH COURT (PULAU PINANG) — CRIMINAL CASE NO 45-11-93
JEFFREY TAN JC
1 NOVEMBER 1995

Criminal Law *— Firearms (Increased Penalties) Act 1971 — s 3 — Robbery with discharge of firearm — Whether firearm in question should be produced at trial — Whether firearm was discharged at the time of committing the offence — Meaning of 'at the time of committing the offence'*

Criminal Law *— Penal Code (Malaysia) — s 308 — Attempt to commit culpable homicide — Accused allegedly shot at police after committing robbery — Whether discharge of the firearm was an act separate and distinct from the robbery — Conflicting evidence regarding the shooting — Whether accused cast a reasonable doubt on prosecution case*

Evidence *— Identification parade — Conduct of identification parade — Whether fair to use one-way mirror — Safeguards to be adopted — Whether accused should be given oppurtunity to see actual identification process and his accusers — Whether proper for witnesses at parade to meet each other before the identification*

The accused was originally charged for discharging a firearm with intent to cause death or harm, an offence punishable under s 3 of the Firearms (Increased Penalties) Act 1971 ('the Act'). According to the evidence, the accused had robbed a goldsmith shop. As soon as he stepped out of the shop, the accused was seen firing his gun in the direction of the adjoining shops. In the submission of no case to answer, counsel for the accused submitted, inter alia, that: (i) the identification parade held, using a one way mirror, was entirely improper; (ii) the charge was defective, as the prosecution evidence indicated that the alleged robbery was committed inside the shop but the firearm was discharged outside the shop; and (iii) there was no proof that the accused had a firearm. The court subsequently amended the charge under s 3 to s 4 of the Act and added a charge under s 308 of the Penal Code (FMS Cap 45) ('the Code') and called upon the accused to enter his defence. The accused elected to give evidence on oath and in the defence, he admitted that he staged the robbery and had the complainant's gold ornaments with him when he walked out of the shop. He, however, raised one issue in his defence which was that he was not in possession of a firearm and had not discharged a firearm as his was only an imitation firearm.

Held, convicting and sentencing the accused:

(1) Where there is sufficient cause, it is certainly not improper to conduct an identification parade using a one-way mirror provided that such parade may only take place when the accused's solicitor, friend or appropriate adult is present or the parade is recorded on video. In this case, however, the identification parade was conducted in a manner that was less than fair as the accused was

not given an opportunity of seeing the actual identification process and his accusers. While the accused did decline the presence of his solicitor, none of the other safeguards was adopted. Further, the witnesses at the identification parade were assembled in the same room before the identification was carried out. This was less then desirable as it might give the witnesses an opportunity to fortify and even correct their recollection of the person to be identified (see pp 288G, 289E–I ; *Ong Lai Kim v PP and other appeals* [1991] 3 MLJ 111 followed).

(2) In a case dealing with the discharge of a firearm in the course of a scheduled offence there was no need for the firearm in question to be produced, unlike a case dealing with the possession of firearm. That being so, the non-production of the firearm here was not a defect in the prosecution's case (see p 287F–I; *PP v Choo Chuan Wang* [1992] 2 CLJ 124 followed; *Sun Kam Heng v PP* [1992] 2 MLJ 826 distinguished).

(3) The ingredients to be proved for an offence under s 3 of the Act were: (i) a robbery committed by the accused; and (ii) the accused 'at the time of his committing the robbery' discharged a firearm with intent to cause death or hurt to anyone. As such the discharge of the firearm must be before the completion of offence. At the close of the prosecution case, there was no doubt whatsoever as regards the robbery, the discharge of a firearm, and the fact that the robber was undoubtedly the accused. However, the accused discharged his firearm not at his victims but at the constables lurking nearby. Therefore, it was not proved that the accused discharged a firearm 'at the time of his committing the robbery' and the charge under s 3 of the Act was not made out (see pp 290C–D, F–G, 291D).

(4) The discharge of the firearm was an act separate and distinct from the robbery and by itself was a punishable offence. Therefore, the charge under s 3 of the Act should be amended to one under s 4 of the Act and a charge under s 308 of the Code was added as another charge (see p 291E–H).

(5) The defence of an imitation gun was disbelieved and at the end of the defence, no doubt was cast on the prosecution case that (i) there was an exchange of gunfire outside the complainant's shop; and (ii) the firearm discharged by the accused was the firearm exhibited during the robbery. The three bullet slugs found at the scene, although the actual location where it was found was in doubt, was the independent and corroborative evidence of a gun battle between the constables and the accused (see p 294E–H).

[Bahasa Malaysia summary

Si tertuduh pada mulanya dipertuduh kerana melepaskan tembakan senjata api dengan niat menyebabkan kematian atau kecederaan, satu kesalahan di bawah s 3 Akta Senjata (Penalti Lebih Berat) 1971 ('Akta itu'). Mengikut keterangan, si tertuduh telah merompak sebuah

kedai emas. Sebaik sahaja dia keluar dari kedai itu, si tertuduh dilihat menembak pistolnya ke arah kedai-kedai bersebelahan. Dalam penghujahan tiada kes untuk dijawab, peguam untuk si tertuduh mengatakan, antara lainnya, bahawa: (i) perbarisan pengenalpastian yang diadakan, menggunakan cermin sehala, pada keseluruhannya adalah tidak betul; (ii) pertuduhan itu cacat, kerana keterangan pendakwaan menunjukkan bahawa rompakan itu telah berlaku di dalam kedai tetapi senjata api ditembak di luar kedai itu; dan (iii) tiada bukti bahawa tertuduh mempunyai senjata api. Mahkamah kemudiannya meminda pertuduhan dari s 3 ke s 4 Akta itu dan menambahkan pertuduhan di bawah s 308 Kanun Keseksaan (NMB Bab 45) ('Kanun itu') dan memanggil si tertuduh untuk memasukkan pembelaannya. Si tertuduh memilih untuk memberikan keterangan bersumpah dan dalam pembelaan, dia mengaku bahawa dia telah melakukan rompakan itu dan ada membawa barang-barang emas pengadu dengannya semasa dia berjalan keluar dari kedai itu. Dia, walau bagaimanapun, membangkitkan satu isu dalam pembelaannya iaitu dia tidak mempunyai milikan senjata api dan tidak melepaskan tembakan dari senjata apinya kerana yang dipegangnya itu hanyalah senjata api tiruan.

Diputuskan, mensabitkan dan menghukum si tertuduh:

(1) Di mana terdapat sebab yang mencukupi, tidaklah salah untuk mengadakan perbarisan pengenalpastian dengan menggunakan cermin sehala dengan syarat perbarisan seperti itu cuma boleh diadakan apabila peguam si tertuduh, kawan atau seorang dewasa yang sesuai hadir atau perbarisan itu dirakam oleh kamera video. Dalam kes ini, walau bagaimanapun, perbarisan pengenalpastian dijalankan dengan cara yang kurang adil kerana si tertuduh tidak diberi peluang untuk melihat proses pengenalpastian yang sebenar dan pihak yang menuduhnya itu. Sedangkan si tertuduh menolak peluang meminta peguamnya hadir, langkah-langkah pelindung yang lain tidak digunakan. Lagipun, saksi-saksi di perbarisan pengenalpastian itu dihimpunkan di dalam bilik yang sama sebelum pengenalpastian dijalankan. Ini kurang baik kerana ia mungkin memberikan saksi-saksi itu peluang untuk mengukuhkan atau membetulkan rekoleksi mereka tentang orang yang bakal dikenalpasti (lihat ms 288G, 289E–I; *Ong Lai Kim v PP and other appeals* [1991] 3 MLJ 111 diikut).

(2) Dalam kes yang berkaitan dengan menembak senjata api semasa kesalahan yang dijadualkan itu dilakukan, tidak terdapat keperluan untuk senjata api itu dikemukakan, berlainan daripada kes milikan senjata api. Dengan itu, senjata api yang tidak dikemukakan di sini bukanlah satu kecacatan dalam kes pendakwaan itu (lihat ms 287F–I; *PP v Choo Chuan Wang* [1992] 2 CLJ 124 diikut; *Sun Kam Heng v PP* [1992] 2 MLJ 826 dibeza).

(3) Unsur-unsur yang perlu dibuktikan dalam kesalahan di bawah s 3 Akta itu adalah: (i) rompakan yang dilakukan oleh si tertuduh; dan (ii) si tertuduh 'pada masa beliau melakukan rompakan'

menembak senjata apinya dengan niat menyebabkan kecederaan atau kematian sesiapa. Oleh itu, penembakan senjata api itu mestilah dilakukan sebelum tamatnya kesalahan itu. Di akhir kes pendakwaan, tiada keraguan sama sekali mengenai rompakan itu, tembakan senjata api itu, dan hakikat bahawa perompak itu sememangnya adalah si tertuduh. Walau bagaimanapun, si tertuduh telah menembak senjata apinya bukan terhadap mangsanya tetapi terhadap dua konstabel yang terhendap-hendap di situ. Maka, tidaklah dibuktikan bahawa si tertuduh menembak senjata apinya 'pada masa beliau melakukan rompakan' itu dan pertuduhan di bawah s 3 Akta itu tidak dibuktikan (lihat ms 290C–D, F–G, 291D).

(4) Penembakan senjata api itu adalah perbuatan yang berasingan dan berlainan daripada rompakan itu dan dengan sendirinya adalah kesalahan yang boleh dihukum. Maka, pertuduhan di bawah s 3 Akta itu patut dipinda ke satu pertuduhan di bawah s 4 Akta itu dan pertuduhan di bawah s 308 Kanun itu ditambah sebagai pertuduhan lain (lihat ms 291E–H).

(5) Pembelaan mengenai pistol tiruan tidak dipercayai dan di akhir pembelaan, tidak terdapat keraguan tentang kes pendakwaan bahawa (i) terdapat tembak-menembak yang berlaku di luar kedai pengadu; dan (ii) senjata api yang ditembak oleh si tertuduh adalah senjata api yang ditunjukkan semasa rompakan itu. Tiga bekas peluru yang dijumpai di tempat kejadian, walaupun lokasi sebenar di mana mereka dijumpai tidak pasti, adalah keterangan bebas dan sokongan mengenai berlakunya perlawanan dengan penggunaan pistol di antara konstabel dan si tertuduh itu (lihat ms 294E–H).]

[*Editorial note*: The accused has appealed to the Court of Appeal vide Criminal Appeal No P–05–107–95.]

Notes

For cases on ss 3 and 4 of the Firearms (Increased Penalties) Act 1971, see 4 *Mallal's Digest* (4th Ed) paras 253–255; [1992] Mallal's Digest 675.

For a case on conduct of identification parades, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1088.

Cases referred to

Doe d Ellis v Owens (1842) 12 LJ Ex 53
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265
Krishnan & Anor v PP [1981] 2 MLJ 121
Lin Lian Chen v PP [1992] 4 CLJ 2086
Ong Lai Kim v PP and other appeals [1991] 3 MLJ 111
PP v Abdul Rahim bin Abdul Satar [1990] 3 MLJ 188
PP v Chiong Cheng Wah [1988] 3 MLJ 56
PP v Choo Chuan Wang [1992] 2 CLJ 124

PP v Hussain bin Sudin [1991] 3 CLJ 2568
PP v Yap Tiang Wah [1992] 1 MLJ 206
Sakhuja v Allen [1972] 2 All ER 311
Suppiah Chethiar, VSP v Navaradnam, KS [1972] MLJ 260
Sun Kam Heng v PP [1992] 2 MLJ 826

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 165
Firearms (Increased Penalties) Act 1971 ss 2, 3 and 4
Penal Code (FMS Cap 45) ss 308, 392, 397
Road Safety Act 1967 s 3(3)(a) [UK]
Road Transport Act 1981 s 25 [UK]

Ishak bin Mohd Yusoff (Deputy Public Prosecutor) for the plaintiff.
Athimulan Muruthiah (*Athimulan & Co*) for the accused.

Jeffrey Tan JC: The accused was charged for an offence punishable under s 3 of the Firearms (Increased Penalties) Act 1971 ('the Act'). The charge read as follows:

> Bahawa kamu pada 18 Ogos 1992, jam lebih kurang 3.30 petang, di kedai Tai Loong Diamond & Jewellery, di No 90, Lebuh Pitt, di dalam daerah timur laut, di dalam negeri Pulau Pinang, telah melakukan rompakan di kedai berkenaan, dan semasa melakukan rompakan itu, kamu telah melepaskan tembakan senjata api ke arah Kons 89541 Mohd Tahir bin Mohd Shah dan Kons 109196 Mohd Yusof bin Ismail, dengan niat menyebabkan kecederaan atau kematian, dengan demikian kamu telah melakukan satu kesalahan di bawah s 3 Akta Senjata (Penalti Lebih Berat) 1971 yang boleh dihukum di bawah seksyen yang sama Akta tersebut.

The testimony of 19 prosecution witnesses may be summarized as follows.

At about 3–3.15pm on the 18 August 1992, SP1 and his brother (SP15, the complainant) were attending to two clients at their goldsmith shop, Tai Loong Diamond and Jewellery of No 90, Pitt Street, Georgetown. They saw the accused parking a motorcycle outside their shop. The complainant opened the front door of their shop for the accused. The accused entered the complainant's shop and was attended to by SP1. The accused asked for and was shown certain gold ornaments. Having inspected those ornaments, the accused asked for and was shown further ornaments. Not long thereafter, the complainant's other two clients left the shop. The accused then whipped out a gun and declared he was staging a hold-up. The accused demanded the gold ornaments displayed in the counter, and SP1 removed two trays containing gold ornaments from the display counter and handed it to the accused. The accused emptied the gold ornaments into a plastic bag, and proceeded to walk out of the shop. Failing to open the front door, the accused then flashed his gun at the complainant and demanded that the door be opened for him. The complainant opened the front door, and the accused with a gun in his right hand and a bag of gold in the other (SP1, however, said the accused had pocketed the bag) then walked out of the shop. As soon as the accused had stepped out of the

shop, the complainant and SP1 saw the accused firing his gun in the direction of the adjoining shops on the right, that is the shops with numbers 92 and onwards. Huddling behind the display counter, both complainant and SP1 said they heard several rounds of gunfire, and saw, from the mirrors on the walls, the accused discharging his gun. They said the accused's gun was similar to those used by the Royal Malaysian Police.

At about that time two police constables, SP9 and SP12, were patrolling in the vicinity. SP9 had just signed the police visitation book at No 94, Pitt Street, the business premises of a neighbouring goldsmith two doors away from the complainant's shop, when a security guard (Sebastian a/l Santharan) employed by the goldsmiths in the area (including the complainant), came inside shop No 94 and informed them that a robbery was taking place in the complainant's shop. The constables proceeded immediately to investigate. The front door of the complainant's shop was made of glass, and the constables saw the accused behind the front door with a gun in his right hand. The accused got out of the complainant's shop and started shooting at the constables with a firearm. The constables returned the accused's gunfire. SP12, covered by SP9, then dashed to a large flower pot standing in front of the complainant's shop. A further exchange of gunfire ensued between the constables and the accused. The accused who was hiding behind the shop front pillars then got onto a motorcycle parked outside the complainant's shop and sped off in the direction of Chulia Street, with SP9 and SP12 on foot in vain pursuit, but discharging nonetheless gunshots at the fleeing accused.

In the subsequent police investigation, the police officer then in charge of the investigation (SP18) recovered two bullet slugs from the complainant's shop and one near the large flower pot. The three bullet slugs were not sent for examination by a ballistic expert, but an armaments officer from the Penang Police Contingent (SP11) testified that the bullet slugs produced in court were not government issue. The bullet slugs were, however, examined by a government chemist (SP10) but he was not able to determine its calibre. As for the gold ornaments lost in the robbery, SP1 identified the gold ornaments in envelopes EX1A, EX1B, EX1C and EX1D ('P5(16), P6(4), P7(11), P8(8)') as part of the ornaments in the two trays he handed to the accused.

Submissions at the close of prosecution case

Learned counsel submitting there was no case to answer, made the following points:

(a) the identification of the accused was doubtful, as SP9 and SP12 had sight of the robber for only two to three minutes, and even then under the tension of a running battle. The robber was helmeted, but all participants of the identification parade were not. One Ong Khoon San was put to the officer in charge of the parade as having participated in the parade, and Ong Khoon San was not called to rebut that suggestion. The identification at the parade using a one-way mirror was entirely improper;

(b) the charge was defective, as the prosecution evidence indicated the alleged robbery was committed inside the shop but the firearm was

A discharged outside the shop;

(c) there was no proof that the accused had a firearm, the Supreme Court case of *Sun Kam Heng v PP* [1992] 2 MLJ 826 required a firearm to be strictly proved by the evidence of a ballistics expert who had examined and tested the firearm in question, and since the firearm was not recovered, examined and naturally not produced, the oral evidence of four witnesses — that they saw a firearm — was not the proof of a firearm within the definition of s 2 of the Act;

(d) the failure to examine the constables' revolvers for its serviceability, either by a chemist or armaments officer, was a further defect in the prosecution case;

(e) there was no evidence of any bullet marks on the adjoining shops' pillars consistent with the constables' story that they were shot at while standing in front of the adjoining shops; and

(f) there was no evidence on the proper custody of the bullet slugs before it was produced in court.

Concluding his submission, learned counsel said the evidence at the very most disclosed only an offence under s 392 read together with s 397 of the Penal Code (FMS Cap 45) ('the Code'), but it did not disclose a s 3 offence, much less the discharge of a firearm. He also pointed out certain discrepancies in the prosecution witnesses' evidence.

Expressing his understanding of s 3, the learned deputy public prosecutor ('DPP') contended that the words 'at the time of his committing the schedule offence' encompass any subsequent conduct to facilitate the commission of a schedule offence. He, however, admitted that his proposition on s 3 was lacking judicial authority, but he said that the proximity in time and place between the robbery inside the shop and the discharge of the firearm outside, was analogous to s 165 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), and by drawing a parallel, were one and the same offence. The discharge of the firearm, he said, was to facilitate 'the escape from the crime of robbery'. On proof of firearm, he submitted that all material witnesses had testified that the accused discharged the gun held in his hand, the bullet slugs recovered from the scene was the undoubted evidence of a third firearm, and the constables said they were shot at by the accused; the prosecution case could not be any clearer.

On the identification parade, the learned DPP maintained it was regular, the accused was asked if he required a solicitor, and Ong Khoon San was not called to testify as the officer in charge of the parade (SP14) by naming all the participants, and there was no Ong Khoon San, had impliedly rebutted Ong Khoon San's participation. As for the non-production of the gun, he said the gun was not recovered. He urged the court to consider why SP9 and SP12 had to shelter behind pillars and a flower pot if gunshots were not fired at them. On other issues raised by learned counsel, the learned DPP submitted that the evidence on the three bullet slugs by the armaments officer should not be marked down just because he examined the slugs in court but not prior to the trial. On point raised by learned counsel (at the stage it was tendered) that the police

constable who reduced the complainant's verbal report into writing was not called, he said, the constable who reduced the complainant's oral report into writing was *ipso facto* not turned into the maker of the report (see *PP v Abdul Rahim bin Abdul Satar* [1990] 3 MLJ 188), and the report was not hearsay as the complainant signing on the report had adopted the contents as his own. In conclusion, he said the prosecution had at the very least proven a prima facie case for a s 4 (of the Act) offence.

Findings of the court

That there was a robbery within the meaning of the Code was inarguable, the recovery of the gold ornaments contained in four envelopes marked EX1A, EX1B, EX1C and EX1D by the investigation officer coupled with the definitive and precise manner in which it was identified — SP1 weighed each gold ornament produced in court and compared the weight obtained with his list of the weight and description of the gold ornaments lost during the robbery, all laboriously and painstakingly carried out while giving his evidence — left no doubt whatsoever that the gold ornaments contained in the four envelopes EX1A to EX1D came from the complainant's shop, and substantiated unquestionably the veracity in the complaint of both the robbery and the ensuing material loss.

Who robbed the complainant's shop was also not in doubt. SP1 who attended to the robber for about ten minutes had ample time to observe and register the features of the robber, and both SP1 and SP15 pointed unhesitatingly to the accused as the robber. Without a waver both said the accused had a gun during the hold up. Thus compelled, SP1 handed to the accused the gold ornaments. Categorical and forthright, they both said the accused had a gun, similar to that used by the police, in his right hand.

The police constables (SP9 and SP12), who had the shootout with the robber, were equally specific in their identification of the accused as the robber who shot at them at the material time in question.

So, the accused was indelibly and positively identified by the complainant (SP15), SP1, SP9 and SP12, in a manner which was assertive and unfaltering. Apart from that indelible identification, in court that is, there was other evidence that pointed irresistibly to the accused as the robber. The constables who said they returned the robber's gunfire testified they had discharged shots at the fleeing robber, and in the words of SP9, 'saya rasa dia kena tembak'. The accused arrested one month after the robbery, was sent to the Penang General Hospital where he was radiographed and was examined by a government forensic pathologist ('SP2').

Those radiographs were exhibited, and SP2 duly pointed out, to the court, the physical injuries shown on the radiographs. He testified that his physical examination of the accused and the radiographs indicated, and it was so accepted by the court, the accused had two healed gunshot wounds. One wound was in the elbow region of the left arm and the other in the right buttocks, with the entry point in each case from the back of the accused, wounds not inconsistent with: (i) the accused being shot at while

his back was turned to the gun/s firing at him; and (ii) the constables' shots at the fleeing robber.

By no stretch of the imagination could it be said that gunshot wounds were frequent in Georgetown or in Malaysia for that matter. However, it could be said that no shooting incident, a rare and sensational incident, could be hidden from the authorities unless the assailant and victim intended it so and even then near impossible if one had sustained a gunshot wound. That being so, the shooting incident that caused the accused's gunshot wounds would not have been missed by the authorities. If the accused was a victim, he would have reported the incident, but there was no such report, the accused's or anyone else's, except the constables' information, and the accused's wounds were not inconsistent with the wounds sustained by the robber shot at as he was fleeing the scene.

As noted, the robbery was established beyond a reasonable doubt. The defence submitted that no weapon was involved. It was, however, a submission that could not be reconciled with the undoubted facts: why should the complainant and SP1, and it was observed that either was bigger than the accused, have passively and submissively handed over the ornaments and not overpowered the accused? Learned counsel said, if at all there was only a robbery, yet his guarded concession was begging the question, 'robbery, and with what?'

In the instant case, as in *PP v Hussain bin Sudin* [1991] 3 CLJ 2568, the firearm was not recovered, it was contended by the defence that the firearm in question must be produced, and in the absence of a firearm and a ballistic expert's report towards proof of a firearm within the meaning of s 2, meant there was no case that the accused at the time of his committing the robbery had discharged, much less exhibited, a firearm.

With respect to learned counsel, *Sun Kam Heng v PP* was a case of possession of a firearm in a security area, and a ballistic expert and chemist report were both needed to prove that the firearm produced was a firearm. The instant case was not one of possession but one of the discharge of a firearm in the course of a scheduled offence, the ingredients being the commission of a scheduled offence and the discharge of a firearm (see *PP v Choo Chuan Wang* [1992] 2 CLJ 1242 at p 1249). This is quite unlike possession offences, as in the case of dangerous drugs where the identity of the drug produced must be strictly proved by a chemist, and in the case of a firearm where the expert testimony of an armourer and the report of the government is required to prove a firearm.

If the success of a s 3 prosecution is dependent upon the production of the firearm concerned, and it might have been disposed of in myriad ways where retrieval is not possible, the insistence yet on the production of the firearm concerned will only set an unachievable standard of proof but also render sterile the intent of s 3 and encourage firearm offences.

That being so, the non-production of the firearm, entirely reasonable, was not a defect in the prosecution case. Indeed, the evidence of the material witnesses manifested the accused had a firearm, the constables discharged several rounds and were held back for two to three minutes,

while they could easily have pounced on the robber if the robber was unarmed. Furthermore, none of the material witnesses were shown to be of profligate or abandoned character, and there were no reasons to doubt or question their testimony that the robber had discharged the gun that was in his hand. A

On the bullet slugs recovered from the scene, where it was recovered was however in doubt. SP18 said he recovered two slugs from shop No 90, in the places shown in photographs P21(6) and P21(9). He subsequently corrected himself and said he was not sure where one slug (the one in P21(9)) was found. The material witnesses testified that the accused standing outside shop No 90 was shooting in the direction of shop No 92 and in the direction of the large flower pot. In either case, the accused was shooting away from shop No 90, and the two slugs recovered from shop No 90 could not possibly be from the accused's firearm. Where the two bullet slugs were found was therefore seriously in doubt. The third bullet slug was found near the large flower pot where SP12 had taken his position. However, in the absence of any evidence that the vicinity was guarded after the shootout, and the diffident manner in which SP18 had rendered his evidence, little reliance could be placed on SP18's evidence, save that three slugs, but not from the constables' firearms, were found in the vicinity of the robbery in question. B C D

There was, however, no reliance on the evidence of the identification parade as its probative weight was deprecated by the following. E

The material witnesses at the scene of the alleged offence (SP1, the complainant, SP9 and SP12) were confined to the same room before they were individually called upon to identify the robber. While nothing could prevent SP1 and SP15 from exchanging mutual notes and recollection of the person who robbed their shop, and in the case of the police constables likewise of the person who shot at them, yet to have assembled all witnesses in the same room just as they were required to identify the robber, was less than desirable, as it gave the witnesses (at the parade) an opportunity, if need be, to fortify, and even correct their recollection of the robber, and that possibility was not excluded by the prosecution. F G

More prominently, the identification parade was conducted in a manner that was less than fair — the accused and 11 others were paraded behind a one-way mirror — as the accused was not given an opportunity of seeing the actual identification process and his accusers.

There are no statutory provisions governing the conduct of an identification parade. The police have only the guidelines in the Inspector-General's standing orders. Still needless to say, an identification parade must not only be conducted fairly but also seen to be conducted in as fair a manner as possible, but not be so if the goings-on at the actual identification process were screened from a suspect. H

Bearing in mind that the purpose and function of an identification parade is to have confirmed an arrested person as the wrongdoer, and for all practical purposes, the other participants in a parade are merely making up the numbers, plucked off the streets (usually the case), the actual identification process must be transparent to the real suspect. In the I

instant case, the four witnesses who testified to their identification of the accused by way of a one-way mirror, admitted they could not be seen by the accused, the evidence that the accused was identified during the parade was therefore the prosecution's and the only version before the court. The accused, barred from witnessing the identification process, was denied an opportunity to give his version of the events at the parade. Of course, an accused despite witnessing the entire identification process is yet not precluded from alleging an unfair identification parade. Then it is an issue for the court to settle, after it has taken into account the credibility and demeanour of witnesses and related their testimony to the undeniable evidence available. However, in the instant case, there was a total denial to the accused of all that was going on behind the one-way mirror, and in so far as he was entitled to know and to witness the identification process, the accused was made dependent on others, none of whom was on his side.

In *Ong Lai Kim v PP and other appeals* [1991] 3 MLJ 111, an appeal against a conviction for rape and robbery, the appellants' objection at the trial court to their identification at the parade with the victim standing behind a one-way mirror was advanced as the main ground in the appeal. Dismissing the appeal, Zakaria Yatim J (as he then was) noted the absence of any express provision in the Code or in the Evidence Act 1950 on the procedure for identification parades, and held that by virtue of s 5 of the CPC, the English procedure on identification parades was applicable. The learned judge cited a passage from *Archbold's Criminal Pleading and Practice* (43rd Ed) at p 1148, reproduced below in extenso:

> A parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see members of the parade without being seen ... The procedures for the composition and conduct of the parade are the same in both cases, subject to para 7 below (except that a parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult is present or the parade is recorded on video) ... Once the parade has been formed, everything afterwards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, solicitor, friend or appropriate adult who is present (unless the parade involves a screen, in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).

and furthermore held that the police was justified in adopting the one-way mirror procedure, as: (i) the appellants had not retained counsel when the parade was conducted; (ii) there was no evidence to show the police had denied the appellants to have their friends or solicitors present; (iii) the victim was not willing to attend an identification parade, being too scared to face her assailants once more; and (iv) the identification parade must be conducted to complete the police investigation.

Where there is sufficient cause, it is certainly not improper to conduct an identification parade using a one-way mirror. Yet with the justification, a one-way mirror is only in use in England with the safeguards enumerated in Archbold. In the instant case, the officer in charge of the parade testified that he asked the accused whether he required the presence of his solicitor, to which the accused promptly declined. However, that invitation satisfied

none but one aspect of the safeguards, and conducted in the manner said, it could not be said that the parade was conducted fairly. A

Thus, at the close of the prosecution case there was no doubt whatsoever as regards the robbery at No 90, Pitt Street, Georgetown, the discharge of a firearm, and the fact that the robber was undoubtedly the accused. B

Section 3 of the Act reads as follows,

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to anyone shall notwithstanding that no hurt is caused thereby, be punished with death. C

and robbery, within the definition of the Code, was listed in the First Schedule of the Act as a schedule offence.

The ingredients to be proved for a s 3 offence was, therefore: (i) a robbery committed by the accused; and (ii) the accused 'at the time of his committing (the) robbery' discharged a firearm with intent to cause death or hurt to anyone. That no hurt was caused by the discharge of the firearm was, however, of no consequence to the offence. D

The predicate to the discharge of a firearm in s 3 was 'who at the time of his committing'. Such precedents there were on s 3 offences (see *PP v Hussain bin Sudin* [1991] 3 CLJ 2568; *PP v Chiong Cheng Wah* [1988] 3 MLJ 56; *PP v Yap Thiang Wah* [1992] 1 MLJ 206; *Krishnan & Anor v PP* [1981] 2 MLJ 121) did not elaborate on the words in question. There was no such need as the facts in each of those cases disclosed the firearm concerned was clearly discharged before the completion of the scheduled offence, and the question, whether the accused concerned had discharged a firearm 'at the time of his committing the schedule offence', never arose for judicial consideration. E F

The evidence in the instant case, however, offered no such luxury. The accused had walked out of the shop he robbed. His victims, though in a state of shock and fear, were not physically harmed nor threatened by a discharge of a firearm. The accused was outside the shop, and was making his getaway when he discharged his firearm, not at his victims, but at the constables lurking nearby. Could it, therefore, be said that the accused had discharged his firearm 'at the time he was committing' the scheduled offence? G

Some understanding of the word 'at' was deduced from the following. H

In *Doe d Ellis v Owens* (1842) 12 LJ Ex 53, the word 'at' was judicially enunciated to read as *before* and not *after*, and the court further pronounced that the words 'at the commencement' have reference to time, and can only mean before or at the time of commencing the suit.

Black's Law Dictionary (6th Ed) defines 'at' as a term of considerable elasticity of meaning, and used, inter alia, to fix a time, though not necessarily *eo instante* or the identical time named, or even a fixed definite moment. That the word 'at' having an elastic meaning was also recognized by the Malaysian Courts in *VSP Suppiah Chettiar v KS Navaradnam* [1972] 2 MLJ 60. I

A Section 3(3)(a) of the English Road Safety Act 1967 (substituted by s 25 of the Road Transport Act 1981) provided that a person who failed to provide a specimen for a laboratory test should be guilty of an offence, if it was shown that 'at the relevant time' he was driving or attempting to drive a motor vehicle on a road or other public place. In *Sakhuja v Allen* [1972] 2 All ER 311, the House of Lords per Viscount Dilhorne said, 'to B give s 3 a reasonable interpretation in its context, the words 'at the time' must be given a broad interpretation as signifying the occasion rather than the moment of time when the request was made'.

That s 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must C therefore be narrowly construed. The natural meaning of the words 'at the time of his committing the offence' emphasizes the time of the commission of the offence and specifies the discharge of a firearm before the completion of a scheduled offence. The choice in the language — the present participle — was deliberate and reflected the legislature's intention to have severely D punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence. In the instant case, the accused discharged his firearm not at his victims, and it was not proved that the accused discharged a firearm 'at the time of his committing the robbery'.

Yet having subjected the prosecution evidence to a maximum evaluation on the guidelines enunciated in *Khoo Hi Chiang v PP and* E *another appeal* [1994] 1 MLJ 265, the court was more than satisfied that the accused exhibited a firearm 'at the time he was committing a robbery' at No 90, Pitt Street, an offence punishable under s 4 of the same said Act. He discharged his firearm not 'at the time he was committing the robbery' but after he had robbed the goldsmith. The charge to wit that he discharged F the firearm at the constables 'at the time of his committing' the schedule offence was therefore not made out; in fact, the constables were two doors away. The accused only exhibited a firearm 'at the time of his committing a schedule offence' and the scheduled offence, within the context of the Act, has been completed when the accused was outside the complainant's shop.

G The discharge of the firearm was, therefore, an act separate and distinct from the robbery. But having said that, the discharge of a firearm at the constables must surely be a punishable offence, the provisions in the Act were considered but having taken into account the prosecution's prima facie case under s 4, no trifling matter, it was the finding of the court H that a charge under s 308 of the Code was the appropriate charge to be added for rebuttal by the accused.

Section 308 of the Code reads as follows:

> Anyone does an act with intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of culpable homicide I not amounting to murder, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

A necessary ingredient of a s 308 offence was intention or knowledge. That intention was inferred from the accused's conduct, as he surely must have known, and it was so imputed, that his shots at the constables, even intended to hold the constables at bay, could cause such grievous bodily harm as likely to cause death.

For the reasons set out in this judgment, the court amended the original charge under s 3 to one under s 4 of the Act and added a charge under s 308 of the Code, and called upon the accused to enter his defence on the following charges:

(1) Bahawa kamu pada 18 Ogos 1992 jam lebih kurang 3.30 petang, di Kedai Tai Loong Diamond & Jewellery di No 90 Lebuh Pitt, di dalam daerah timur laut, di dalam negeri Pulau Pinang, telah melakukan rompakan dan semasa melakukan rompakan itu, telah mempamirkan senjata api dalam keadaan yang mana ia menyebabkan Liew Kim Wah dan Leow Yeow Wah ketakutan yang boleh menyebabkan kematian atau kecederaan, dengan demikian kamu telah melakukan kesalahan di bawah s 4 Akta Senjata (Penalti Lebih Berat) Tahun 1971 yang boleh dihukum di bawah seksyen yang sama akta tersebut.

(2) Bahawa kamu pada 18 Ogos 1992 jam lebih kurang 3.30 petang, di luar Kedai Tai Loong Diamond & Jewellery di No 90, Lebuh Pitt, di dalam daerah timur laut, di dalam negeri Pulau Pinang, telah melepaskan tembakan senjata api ke arah Kons 89541 Mohd Tahir bin Mohd Shah dan Kons 109196 Mohd Yusof bin Ismail dengan niat hendak menyebabkan kematian atau hendak menyebabkan sesuatu bencana tubuh yang mungkin menyebabkan kematian dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 308 Kanun Keseksaan (NMB Bab 45).

The accused elected to give his evidence on oath.

The accused was the only defence witness, and raised just one issue in his defence. He virtually confirmed what was said by SP1 and SP15 about the robbery. He said he entered the shop and pulled out an imitation gun. He declared he was staging a hold-up, and demanded the gold ornaments in the display counter. He placed a plastic bag on the display counter, and SP1 handed to him two trays containing gold ornaments. He emptied the gold ornaments from the trays into a plastic bag and proceeded to walk out of the shop. The door was however locked. He then pointed his imitation gun at SP1 and demanded that the door be opened for him.

Up to that point all that was said by SP1 and SP15 was not disputed by the accused, and the court had the accused's judicial admission that he staged the robbery and had the complainant's gold ornaments with him when he walked out of the shop.

The accused, however, disputed the prosecution's version of the events after he was outside the shop. He said he was fired upon by the constables the moment he stepped out of the shop. He sheltered behind one of the shop pillars, but each time he protruded his head he was fired upon. Thinking only of escape, he dashed to his motorcycle and took off in the direction of Chulia Street, towards Odeon cinema. As he was getting away he felt he was hit. He maintained he was not in possession and had not discharged a firearm; his was an imitation firearm.

Before considering the defence, the court duly reminded itself that an accused is not at all obliged to prove his innocence. An accused person has no legal burden of proof, and even though called upon to enter his defence, and that only after the prosecution had made up a prima facie case which unless rebutted would warrant his conviction, he has only to create a doubt in the prosecution case that he is guilty as charged. An accused is entitled to benefit from any defect or infirmity in the prosecution case, or from any doubt in the prosecution case. Whether the doubt in the prosecution case arose in the prosecution case itself or during the defence stage is however quite immaterial. In the instant case, there were no legal presumptions that required a rebuttal on the balance of probabilities, and a reasonable doubt was sufficient to earn the accused an acquittal.

The accused said his was an imitation gun; whether the accused had an imitation gun was exposed by one penetrating question from the learned DPP, who asked,

> ... if yours was an imitation gun why did you not throw it away? If you had thrown it away, would the police constables not stopped their shooting?

Sensing he had the accused cornered, the learned DPP pursued with the following question,

> ... if you had thrown away the bag of gold would not the constables also stop their shooting?

The question not asked by the learned DPP was, of course, 'Where is the imitation gun?'

The imitation gun issue was, however, raised only in the defence, as throughout the prosecution case the defence did not impart a suggestion or hint of a such possible defence. In *Lin Lian Chen v PP* [1992] 4 CLJ 2086, the Supreme Court per Edgar Joseph Jr SCJ at p 2092 said, 'Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticized for keeping his defence 'up his sleeve' so to speak, and it branded as a recent invention'.

In the instant case, that statement by the Supreme Court was certainly fortuitous. Even so, was there evidence against the possibility of an imitation gun? At the close of the prosecution case, it was the finding of the court that there was indeed a robbery. Giving his defence, the accused accepted SP1 and SP15's version of the robbery although he disputed the discharge of a firearm. In the event, the prosecution's version of the robbery (in the shop) was entirely conceded by the accused, and SP1 and SP15's credibility was completely intact — therefore, was there reason to doubt SP1 and SP15's evidence that the accused discharged a firearm the moment he walked out of the shop? Both said they heard several rounds of gunfire and one of them even said he saw 'api' from the barrel of the accused's firearm.

The constables who were two doors away saw the accused behind the front glass door with a gun in his hand, evidence that was confirmed by the accused. The prosecution's version of all events up to that point was

therefore agreed. Where the accused differed was to the events outside the goldsmith shop.

According to the constables, the accused fired at them the moment he walked out of the shop. SP12 said he was covered by SP9 as he ran to a big flower pot in front of the shop. SP9 and S12 were therefore positioning themselves to better vantage points — putting the accused in their cross-fire — and diverting the accused's gun-fire. If the accused had an imitation gun, and shots were not fired at the constables, why should the constables position and deploy themselves in a manner that was consistent with them being fired upon? If indeed the accused was not discharging a firearm, where was a need for the constables, to cover each other, despite the considerable risks to themselves, and fire from the relative safety of shop pillars and a large flower pot for about two to three minutes? Why should the constables be shooting at the accused fleeing from the scene if they were not shot at firstly?

The accused said he had not thrown out the imitation gun because he was frightened and was thinking merely of flight, but his admitted robbery of a goldsmith located in one of the busiest streets in Georgetown, even armed with an imitation gun, was a brazen and audacious act of extreme boldness and daring, requiring composure, resolve and nerve. That being so, it would indeed be out of character if the accused was far too frightened to have thought about throwing the imitation gun away. The branding of the imitation gun as a recent invention, therefore, had basis.

The robbery was not disputed. Having duly considered the defence of an imitation gun, but disbelieved for the reasons given in this grounds, the court found, at the end of the defence, no doubt whatsoever was cast: (i) on the prosecution case of an exchange of gunfire outside the complainant's shop, an exchange not possible if the accused had not discharged a firearm within the meaning of s 2 of the Act; and (ii) the firearm discharged by the accused was the firearm exhibited during the robbery. Yes, there were some discrepancies in the prosecution witnesses' evidence, but they were entirely minor and did not affect the prima facie case. Otherwise, the prosecution case was clear cut, straight forward and absolute, and there was no doubt what had actually happened. The three non-government issue bullet slugs found at the scene, although the actual location where it was found was in doubt, was the independent and corroborative evidence of a gun battle between the constables and the accused.

No doubt whatsoever having been cast by the accused to either of the amended charges he was called to rebut, the accused was accordingly convicted and sentenced by the provisions of s 4 of the Act and s 308 of the Code.

Accused convicted.

Reported by Mariette Peters-Goh